

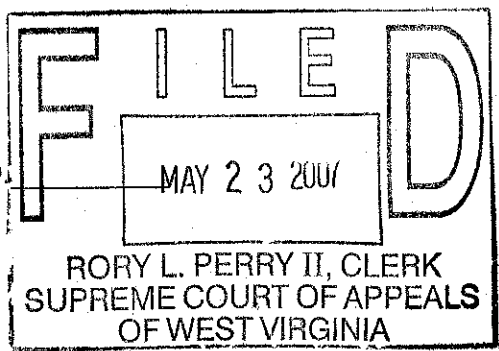
IN THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA

STATE OF WEST VIRGINIA  
EX REL LYNN A. NELSON  
PROSECUTING ATTORNEY OF MINERAL  
COUNTY, WEST VIRGINIA,  
PETITIONER

VS.

CASE NO.

THE HONORABLE ANDREW N. FRYE, JR.  
JUDGE, 21<sup>ST</sup> JUDICIAL CIRCUIT  
RESPONDENT



PETITION FOR WRIT OF PROHIBITION

Comes now the State of West Virginia by Lynn A. Nelson, Prosecuting Attorney for Mineral County, West Virginia and requests a Writ of Prohibition against the Honorable Andrew N. Frye, Jr. of the Circuit Court of Mineral County seeking the vacation of the Court's Order of May 11, 2007 dismissing the charge of Negligent Homicide as a matter of law in the case of State V. James Butler, Jr., Mineral County Circuit Court Case Number 07-M-2.

I. JURISDICTION

The State files this extraordinary Writ pursuant to WV Code 53-1-1 as it has no other means by which to have this matter heard.

II. FACTS

On March 31, 2006 James Butler, Jr. of Faber, Virginia was operating a tractor trailer on U.S. Rt. 50 in Mineral County, West Virginia. As he was traveling west, he approached and navigated a sharp right hand turn. The tractor trailer rolled onto its left hand side ejecting its load of pine logs into the path of and on top of a Toyota Corolla driven by Melissa Ann

Pennington, twenty-four, of Mt. Storm, West Virginia. Mrs. Pennington died a few hours later from injuries received during the incident.

Chief Deputy Paul Sabin of the Mineral County Sheriff's Department conducted an investigation. He obtained a statement from a witness, Kevin Moore of Burlington, West Virginia that prior to approaching the turn he observed the tractor trailer going what he estimated to be between 70 and 75 mph. (See enclosed report).

A traffic crash reconstruction report was requested and performed by Tpr. 1<sup>st</sup> Class J.C. Weaver of the West Virginia State Police. The report concluded the following:

- A. That the turn in which the wreck occurred was in a 55 mph zone but had a posted advisory speed of 25 mph.
- B. The Defendant told Officer Sabin he was going between 35 and 40 mph.
- C. By calculating the drag factor of the roadway and the average pull force, the Defendant was going between 32 and 41 mph. These are minimal speeds.
- D. The deceased was operating her vehicle in an appropriate manner.
- E. The Defendant was operating his vehicle in an unsafe manner by exceeding the advisory speed limit particularly given the size and weight of his vehicle. (See enclosed report).

On January 9, 2007 the Grand Jury of Mineral County indicted the Defendant for one count of Negligent Homicide. The State alleged excessive speed and an unsecure load as the negligent acts of the Defendant. The Defendant was released on bond and was appointed Chad B. Cissel as counsel.

On March 19, 2007 Mr. Cissel filed a Motion to Dismiss based upon this Court's decision in State V. Green, Slip Opinion No. 33200, February 21, 2007. (See enclosed Motion).

On April 19, 2007 the Court granted the Defendant's Motion and dismissed the case as a matter of law stating the facts were insufficient to sustain a conviction over the State's objection. Said Order was entered on the 9<sup>th</sup> day of May 2007. (See enclosed Order).

### III. ARGUMENT

In essence, the Court treated this matter much like a Motion for Summary Judgement in a civil proceeding. However, unlike a Motion for Summary Judgement, we still have contested facts that need to be decided by a jury. While the State will concede that it is very possible the Defendant may be found Not Guilty or even if convicted, this Court could set the conviction aside, both the State and the victim's family should be allowed to present its case to a jury. The jury should listen to the case and decide which facts it determines to be true and apply those facts to the Statute (WV Code 17C-5-1(a)), the Court's instructions and render a verdict.

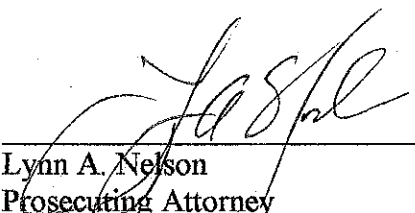
If that verdict results in manifest injustice then the Circuit Court of Mineral County as well as this Honorable Court are available to protect the interests of the Defendant or to sustain the conviction whatever the appropriate action may be.

This Court, over the past several years, has taken great steps to insure access by our citizens to our legal system. To allow Judges, without the benefit of the full presentation of evidence or without the ability to judge the credibility or lack thereof of witnesses, to dismiss criminal cases as a matter of law is a bad precedent. It denies the State and the victims their day in court.

The Circuit Court, after hearing the State's evidence, can grant a Motion for Judgement of Acquittal but at least in that scenario the State has the opportunity to present its evidence and witnesses. The granting of this Motion to Dismiss denied the State and the victim that opportunity.

Both the State and the victim's family feel the Circuit Court of Mineral County should be prohibited from dismissing this case prior to the opportunity to be heard. We ask you to grant this Writ and allow the facts to be heard. Only through a full hearing in this matter can we seek justice while at the same time be fair to the rights of all involved. Isn't that what the legal system is here for?

STATE OF WEST VIRGINIA  
By Counsel

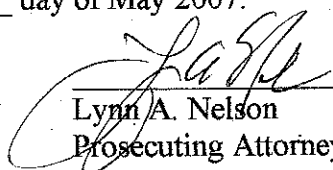


---

Lynn A. Nelson  
Prosecuting Attorney  
P.O. Drawer 458  
Keyser, WV 26726  
(304)788-0300  
WVSB # 4951

CERTIFICATE OF SERVICE

I, Lynn A. Nelson, Prosecuting Attorney for Mineral County, do hereby certify that I served a copy of the foregoing Petition for Writ of Prohibition on the Defendant by hand-delivering a true copy to his counsel, Chad B. Cissel, counsel for James Butler, at his office address of 107 West Street, Keyser, West Virginia 26726 and also mailing a true copy, U.S. Postage Prepaid, to the Honorable Andrew N. Frye, Jr. at his office address of P.O. Box 446, Petersburg, WV 26847 on this the 21<sup>st</sup> day of May 2007.



---

Lynn A. Nelson  
Prosecuting Attorney